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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 723

WILLIS K. BAKER, JR.; and
MERVIN "BUD" CORNELSEN, *Petitioners*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinion below	2
Jurisdiction	2
Question presented	3
Rule 19 statement	4
Statutes involved	6
Statement of the case	7
Argument	10
I. Since conspiracy requires an intent to commit an offense "against the United States, or to defraud the United States", knowledge that the property was stolen from the United States is an express element of such federal crime	10
II. Such knowledge of theft of the property from the United States is essential to constitute any federal mens rea	11
III. The Morissette and Kirby cases have never been overruled and should be followed, not ignored, by the lower federal courts	11
IV. The plain error rule applies to this case in those respects where the record was unprotected	14
Summary	12

Table of Authorities Cited

Cases

	Pages
Baker v. U.S., No. 215, October Term, 1968	3
Brasfield v. United States, 272 U.S. 448	12
Cohn v. United States, (2d Cir.), 258 Fed. 355	5, 6
Crawford v. United States, 212 U.S. 183	11
Davidson v. United States (2d Cir.), 61 Fed. 2d 250	5
Hormel v. Helvering, 312 U.S. 552	11
Kasle v. United States (6th Cir.), 233 Fed. 2d 878	6
Kirby v. United States, 174 U.S. 47	4, 6, 11

Linde v. United States (8th Cir.), 13 Fed. 2d 59 5
Loftus v. United States (2d Cir.), 46 Fed. 2d 841 6
Mahler v. Eby, 264 U.S. 32 ..... 11, 12
Morissette v. United States, 342 U.S. 246 ..... 4, 11
Nassif v. United States, 370 Fed. 2d 147 11
Souza v. United States (9th Cir.), 304 Fed. 2d 274 ..... 5, 6, 11
Tomley v. United States (5th Cir.), 250 Fed. 2d 549 5
United States v. Crimmins (2d Cir.), 123 Fed. 2d 271 ..... 5, 6
United States v. Philadelphia National Bank, 374 U.S. 321 11
United States v. Sherman (2d Cir.), 171 Fed. 2d 619 ..... 5, 6
Wiborg v. United States, 163 U.S. 632 11

Constitutions

United States Constitution:
Fifth Amendment 6
Sixth Amendment 6
Article III, Section 2 6

Rules

Rules of the Supreme Court of the United States:
Rule 19 ..... 4, 10

Statutes

18 Stats. at L. 479, Chap. 144 ..... 4, 5
Title 18 United States Code:
Section 371 ..... 2, 3, 6, 7
Section 415 5
Section 641 ..... 2, 3, 4, 5, 6, 7, 11
Title 28 United States Code:
Section 1254(1) 3

Texts

LaBuy, Manual of Jury Instructions in Federal Criminal Cases, 1965, page 263 5

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PETITION FOR WRIT OF CERTIORARI
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Petitioners Willis K. Baker, Jr., and Mervin "Bud" Cornelsen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which was rendered and entered on July 17, 1970, and which affirmed an order of the District Court denying Appellants' motion objecting to the Court's jurisdiction; and to review the judgment of said Court rendered and en-

tered on August 21, 1970 which denied their petition for rehearing.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in Appendix A annexed hereto.

JURISDICTION

On June 3, 1966, in No. 4269-ND in the District Court of the United States for the Eastern District of California, a jury found both petitioners Willis K. Baker and Mervin Cornelsen guilty under Count I of an indictment of conspiracy to violate 18 U.S.C. Section 641 (conspiracy to receive stolen United States property);[1] and also found petitioner Baker guilty, under Count III of violation of 18 U.S.C. Section 641 (receiving stolen United States property). Petitioners were sentenced July 5, 1966. The United States Court of Appeals for the Ninth Circuit rendered and entered its judgment affirming the convictions on April 4, 1968. (Appendix B.) Their petition for rehearing[2] was denied by judgment rendered and entered therein on May 21, 1968. (Appendix C.)

Thereafter, Petitioners filed in the Supreme Court of the United States their Petition for Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit; and on October 14, 1968, the United States Supreme Court entered its order deny-

[1] Violation of 18 U.S.C. Section 371, but harmlessly mislabeled in the indictment as violation of 18 U.S.C. Section 641.

[2] Duly filed May 3, 1968.

ing said Petition (Baker v. U. S. No. 215, October Term, 1968.)

Thereafter, on January 14, 1969, appellants filed their notice of motion in the United States District Court, Eastern District of California, Criminal No. 4269-ND, objecting to the jurisdiction of the trial court, and said motion was denied on March 27, 1969. (Appendix D.)

Thereafter, on April 4, 1969, appellants filed their notice of appeal from said order. (Appendix E.) And thereafter, on July 17, 1970, the United States Court of Appeals for the Ninth Circuit rendered and entered its judgment affirming the order of the court below denying appellants' motion objecting to the jurisdiction of the trial court. (Appendix A.)

Appellants' petition for rehearing was denied by judgment rendered and entered therein on August 21, 1970. (Appendix F.)

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1). (Appendix H.)

QUESTION PRESENTED

The question presented for review is as follows:

Is scienter (knowledge that the property received had been stolen from the United States), an essential element of the federal crimes of conspiracy to receive[3] and receiving,[4] stolen United States property?

[3] 18 U.S.C. Section 371, conspiracy to violate U.S.C. Section 641.
[4] 18 U.S.C. Section 641.

RULE 19 STATEMENT

The special and important reasons for a review on writ of certiorari are as follows:

(1) The Court of Appeals' decision was, in effect, that scienter (knowledge that the property had been stolen from the United States), is not an element of the crimes of conspiracy to violate, and violation of, 18 U.S.C. Section 641.

(a) Such decision of that federal question is in direct conflict with applicable decisions of this court: *Morissette v. United States*, 342 U.S. 246[5], and *Kirby v. United States*, 174 U.S. 47, at 53 and 64:[6]

> "... (I)t was incumbent upon the government to establish its charge against Kirby, to establish beyond reasonable doubt: . . . (3) that he received or retained it with knowledge that it had been stolen from the United States."
>
> "... If the stamps were in fact stolen from the United States, and if they were received by the accused . . . with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged. . . ."

(b) Such decision of that federal question is in direct conflict with the decisions of other courts of appeals on the same matter, as follows:

---

[5] Theft and conversion of United States property, 18 Stats. at L. 479, Chap. 144, now 18 U.S.C. Section 641.

[6] Receiving stolen United States property, 18 U.S.C. Section 641.

Receiving Offense: Cohn v. United States (2d Cir.), 258 Fed. 355, at 358;[7] *Souza v. United States* (9th Cir.), 304 Fed. 2d 274, 276-277;[8]

Conspiracy-to-Receive Offense: United States v. Sherman (2d Cir.), 171 Fed. 2d 619, 623-624;[9] *United States v. Crimmins* (2d Cir.), 123 Fed. 2d 271, at 272 and 273;[10] *Linde v. United States* (8th Cir.), 13 Fed. 2d 59, 61;[11]

Receiving, and Conspiracy-to-Receive, Offenses: Davidson v. United States (2d Cir.), 61 Fed. 2d 250, at 253-256;[12] *Tomley v. United States* (5th Cir.), 250 Fed. 2d 549, 553.[13]

As to the Seventh Circuit, see LaBuy, *Manual of Jury Instructions in Federal Criminal Cases*, 1965, page 263. (Appendix I.)[14]

(c) Such decision of that federal question is upon an important question of federal law which has not been, but should be, settled by this Court, in that the federal courts of appeal are presently in utter conflict, in that:

---

[7]Receiving stolen United States property, 18 Stats. at L. 479, Chap. 144.

[8]Sale of stolen United States property, 18 U.S.C. Section 641.

[9]Conspiracy to conceal goods stolen from foreign commerce.

[10]Conspiracy to transport securities stolen from interstate commerce, 18 U.S.C. Section 415.

[11]Conspiracy to receive autos stolen and transported in interstate commerce, National Motor Theft Act.

[12]Receiving, and conspiracy to receive, auto stolen and transported in interstate commerce, National Motor Theft Act.

[13]Receiving, and conspiracy to receive, stolen United States property, 18 U.S.C. Section 641.

[14]Containing standard Seventh Circuit instructions on receiving, and conspiracy to receive, stolen United States property, 18 U.S.C. Section 641.

Some federal cases hold that in substantive receiving cases the prosecution must prove knowledge that the stolen goods, received, were federally protected when stolen: *Kirby v. United States*, 174 U.S. at 53 and 64; *Cohn v. United States* (2d Cir.), 258 Fed. at 358; *Souza v. United States* (9th Cir.), 304 Fed. (2d) at 276-277; other federal cases hold that such knowledge is not essential in a substantive receiving charge, but is essential in a conspiracy-to-receive charge, *United States v. Sherman* (2d Cir.), 171 Fed. 2d at 623-624; *United States v. Crimmins* (2d Cir.), 123 Fed. 2d at 272 and 273; and still other federal cases hold that such knowledge is not at all essential to prove either a substantive or conspiracy charge, *Loftus v. United States* (2d Cir.), 46 Fed. 2d 841, 847; *Kuslc v. United States* (9th Cir.), 233 Fed. 2d 878, 882.

STATUTES INVOLVED

This case involves 18 U.S.C. Section 641; 18 U.S.C. Section 371; the due process clause of the Fifth Amendment, United States Constitution; the jury trial and confrontation by witnesses clauses of the Sixth Amendment, United States Constitution; the jury clause, Article III, Section 2, United States Constitution. The pertinent provisions thereof are set forth in Appendix G.

STATEMENT OF THE CASE

On April 7, 1966, an indictment was filed in the United States District Court for the (now) Eastern Division District of California,[15] charging in Count I that between August through December 21, 1965, Baker and Cornelsen, as well as Roger Stephenson and Charles Rush, conspired:

> "... to commit an offense against the United States in violation of Title 18, Section 641, (sic),[16] to wit: the defendants did ... conspire ... to receive, to conceal, and retain, with intent to convert to their own use, and gain; and to dispose of a quantity of aircraft instruments and parts, radio receivers and transmitters and three ARN 21 units, property belonging to the United States Naval Air Station at Lemoore, California, as the defendants knew ..." (CT 2-3.)

In Count III Baker alone was charged with receiving this stolen United States property, therein alleged to be more than $100 in value.[17]

Petitioners both testified in their own behalf, denying they knew the property was stolen, or stolen from the United States. (RT 820-913; 914-975.) Summarizing, they testified that the transactions were purchases of apparently legitimate surplus parts and equipment, at market prices, paid for by checks, and used in the business of Baker or sold elsewhere in the course of business.

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[15] Clerk's Transcript 2-5 (hereinafter called CT.)

[16] Actually, the violation of 18 U.S.C. Section 371.

[17] 18 U.S.C. Section 641.

The Navy witness who established the theft of the items, Lt. Ericksen, testified that the material involved was not secret or classified, and nothing about the appearance of the units involved would indicate they were stolen. (RT 257; 271.)

The Government argued to the jury:

> "I believe the judge will instruct you that it isn't even necessary that they know it's stolen Government property; all they have to know is that this property is stolen. All they have to know is that Mr. Stephenson does not have the property rightfully; where he got it or how he got it isn't important. . . ." (RT 1154.)

Then the trial court instructed the jury:

> "It is not necessary that the Government prove that the defendants knew that the property belonged to the United States; it is only necessary to prove that the property belonged to the United States and that the defendants knew it was stolen.
>
> "I'm not sure I read that correctly—It is not necessary that the Government prove that the defendants knew that the property belonged to the United States; it is only necessary to prove that the property did belong to the United States and that the defendants knew it was stolen." (RT 1283.)

No objection to these instructions is shown in the record.

The jury returned their verdict finding all defendants guilty as charged. (RT 1289-1291; CT 124-125.)

On July 5, 1966, motion for new trial was made on behalf of petitioners, the grounds of which included the point that:

> "(W)e do feel that there was no substantial evidence of knowledge on the part of these defendants, that they knew the property was stolen . . ." (RT 1306-1307.)

The same point was included in the notice of motion for new trial (CT 132-133), as was:

> "The Court erred in charging the jury . . ." (CT 133.)

Upon denial of motion for new trial, Baker was sentenced on July 5, 1966, to two years imprisonment and fined $10,000 on Count I, and two years imprisonment only in Count III, to run concurrently (CT 140); and Cornelsen that same day was sentenced to two years imprisonment on Count I, the first six months to be served in a "jail-type institution" and execution of remaining 1½ years imprisonment suspended. (CT 138.)

Petitioners filed their respective notices of appeal from their convictions on July 12, 1966. (CT 144, 146.)

The Ninth Circuit Court of Appeals affirmed the convictions of petitioners Baker and Cornelsen on April 4, 1968. (Appendix B.)

Petitioners duly filed their petition for rehearing May 3, 1968, now urging specifically that it was plain error to twice instruct the jury, and to allow the prosecution to argue, that it was not necessary for

the Government to prove that the defendants knew that the stolen property belonged to the United States, and on May 21, 1968, the said petition for rehearing was denied. (Appendix C.)

Thereafter, to wit, on January 14, 1969, appellants filed their notice of motion in the United States District Court, Eastern District of California, Crim. No. 4269-ND, objecting to the jurisdiction of the trial court, and said motion was heard and determined adversely to appellants on March 27, 1969. (Appendix D.)

Thereafter, on April 4, 1969, appellants filed their notice of appeal from said order. (Appendix E.)

Thereafter, on July 17, 1970, the United States Court of Appeals for the Ninth Circuit rendered and entered its judgment affirming the order denying appellants' motion objecting to the jurisdiction of the trial court. (Appendix A.)

Appellant's petition for rehearing was denied by judgment rendered and entered therein on August 21, 1970. (Appendix F.)

ARGUMENT

I. SINCE CONSPIRACY REQUIRES AN INTENT TO COMMIT AN OFFENSE "AGAINST THE UNITED STATES, OR TO DEFRAUD THE UNITED STATES", KNOWLEDGE THAT THE PROPERTY WAS STOLEN FROM THE UNITED STATES IS AN EXPRESS ELEMENT OF SUCH FEDERAL CRIME.

See Rule 19 Statement portion of this petition for cases and authorities in support of this portion of the argument (page 4 of this brief).

II. SUCH KNOWLEDGE OF THEFT OF THE PROPERTY FROM THE UNITED STATES IS ESSENTIAL TO CONSTITUTE ANY FEDERAL MENS REA.

See *Nassif v. United States*, 370 Fed. 2d 147 expressly voicing this view that, otherwise, there is nothing more than a state crime.

III. THE MORISSETTE AND KIRBY CASES HAVE NEVER BEEN OVERRULED AND SHOULD BE FOLLOWED, NOT IGNORED, BY THE LOWER FEDERAL COURTS.

Morissette v. United States, 342 U.S. 246; *Kirby v. United States*, 174 U.S. 47, 53, 64; and *Souza v. United States* (9th Cir.), 304 Fed. 2d 274, at 276-277:

> ". . . (W)e believe that the reasoning of the Supreme Court compels the conclusion that criminal intent is an essential element of the offenses . . ." (of selling United States property in violation of the 18 U.S.C. Section 641).

which case approved the following:

> ". . . the jury (was) instructed that . . . each sale or conveyance was made by appellant . . : with knowledge that the property had been stolen from the United States . . ."

IV. THE PLAIN ERROR RULE APPLIES TO THIS CASE IN THOSE RESPECTS WHERE THE RECORD WAS UNPROTECTED.

United States v. Philadelphia National Bank, 374 U.S. 321, 350; *Hormel v. Helvering*, 312 U.S. 552, 557; *Wiborg v. United States*, 163 U.S. 632, 658; *Crawford v. United States*, 212 U.S. 183; *Mahler v. Eby*, 264

U.S. 32, 45; *Brasfield v. United States*, 272 U.S. 448, 450.

SUMMARY

For the reasons given, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
September 15, 1970.

Respectfully submitted,
GEORGE T. DAVIS,
Attorney for Petitioners.

(Appendices Follow)